

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GLOBECAST AMERICA INCORPORATED,

Plaintiff,

- v -

AETNA, INC. et al.,

Defendants.
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MEMORANDUM

CV-08-4695 (FB)(VVP)

Having reviewed with care the decision in Atronic Int'l, GMBH v. SAI Semispecialists of America, Inc., 232 F.R.D. 160, I adhere to the resolution rendered at the hearing yesterday concerning the plaintiff's motion to compel the return of the privileged document that was inadvertently produced in discovery. Although the court in Atronic relied in part on a finding that the document in question there, like the document here, bore no notation that it was privileged or confidential, that was not the sole determining factor for the decision. Indeed, it appears that the court there was ultimately persuaded by the prejudice that the defendant would suffer if the document was unavailable to it. The ruling here, however, is that the defendant is entitled to testimony concerning the factual assertions made in the document, and it is my understanding that the defendant has obtained testimony from one or another of the defendant's employees that endorses each of the factual assertions made in the inadvertently produced document. This eliminates any prejudice that results from the unavailability to the defendant of the document itself. This, and other factual distinctions between the situation in Atronic and the situation here, justify a different result here in my view.

Viktor V. Pohorelsky

VIKTOR V. POHORELSKY
United States Magistrate Judge

Dated: Brooklyn, New York
February 25, 2011